81-2262
No.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BILL C. SUTTON, ET AL
and
SUN FRESH FARMS OF LOUISIANA,
PARTNERSHIP, ET AL

Petitioner,

v.

SOUTHERN NATURAL GAS COMPANY

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

BOBBY L. CULPEPPER
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Attorney for Petitioner

QUESTION PRESENTED

Why should this writ be granted as a matter of law and a matter of equity to reverse the findings of the Louisiana Supreme Court in that the Louisiana Supreme Court erred in not ruling that LSA-R.S. 30:22 and LSA-R.S. 19:2 are unconstitutional in that these two statutes are in violation of Amendment V of the United States Constitution; in violation of Amendment XIV, Section 1 of the United States Constitution; these two statutes are in violation of the United States Constitution in that they deprive a person of property, without due process of law, in that they allow one person, being a Commissioner of Conservation, to take private property and in the taking of private property not allow just compensation to the property owners?

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COURT OF APPEAL, SECOND CIRCUIT,
STATE OF LOUISIANA

Petitioner, Bill C. Sutton, et al, and Sun Fresh Farms of Louisiana, Partnership, et al, respectfully pray that a Writ of Certiorari issue of review the final order of the Supreme Court for the State of Louisiana entered herein on February 19, 1982, and to review the judgment and

opinion of the Court of Appeal, Second Circuit, entered on November 2, 1981; Application for Rehearing was filed by the petitioners and on December 10, 1981, the Application for Rehearing was denied by the Honorable Second Circuit Court of Appeal.

OPINION BELOW

The order of the Supreme Court of the State of Louisiana was accomplished by a notice of "Writ Denied. Dixon, C. J. and Watson, J., would grant only as to attorney's fees issue" dated February 19, 1982, as hereto attached at page . The opinion of the Court of Appeal is found at 406 So.2d 657 and 406 So.2d 669, said copy of decision located on page of these writs.

JURISDICTION

The jurisdiction of this court is invoked under the United States Constitution, Amendments V and XIV, and also invoked under

28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS and RULES INVOLVED

CONSTITUTIONAL PROVISIONS:

Article 3, Section 2,
United States Constitution:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority."

Article 6, (Cl. 2)
United States Constitution:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby. Anything in the Constitution or Laws of any State to the contrary notwithstanding."

Amendment 5
United States Constitution:

"...no person shall be...deprived of life, liberty, or property, without due process of law; ...nor shall private property be taken for public use, without just compensation."

Amendment 14, Section 1
United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

RULES:

28 U.S.C. 1257 (3)

"Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn into question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or where any title, right, privileges or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or a commission held, or authority exercised under the United States."

42 U.S.C. 1983

"Every person who, under color of any statute, ordinance, regulation, custom or

usage of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law; suit, and equity, or other procedure for redress."

LOUISIANA CONSTITUTIONAL PROVISIONS:

Article 1, Section 4,
Louisiana Constitution of 1974

"...Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question..."

LOUISIANA STATUTES:

LSA-R.S. 30:22

"...C. The commissioner shall determine with respect to any such underground reservoir proposed to be used as a storage reservoir, whether or not such reservoir is fully depleted or the original commercially recoverable natural gas and condensate content therein. If the commissioner finds that such reservoir has not been fully depleted, the commissioner shall determine the amount of the remaining commercially recoverable natural gas and condensate content of such reservoir.

D. The commissioner may issue any necessary order providing that all natural gas which has previously been reduced to possession, and which is subsequently injected into an underground storage reservoir shall be all times be deemed the property of the injector, his successors and assigns; and in no event shall such gas be subject to the right of

the owner of the surface of the lands or of any mineral interest therein under which such underground storage reservoir shall lie or be adjacent to or of any person than the injector, his successors and assigns, to produce, take, reduce to possession waste or otherwise interfere with or exercise any control thereover; provided that the injector, his successors and assigns, shall have no right to gas in any stratum or portion thereof not determined by the commissioner to constitute an approved underground storage reservoir. The commissioner shall issue such orders, rules and regulations as may be necessary for the purpose of protecting any such underground storage reservoir, strata or formations against pollution or against the escape of natural gas therefrom, including such necessary rules and regulations as may pertain to the drilling into or through such underground storage reservoir."

LSA-R.S. 19:2

"Where a price cannot be agreed upon with the owner, any of the following may expropriate needed property:

(1) The state or its political corporations or subdivisions created for the purpose of exercising any state government powers;

(2) Any domestic or foreign corporation created for the construction of railroads, toll roads, or navigation canals;

(3) Any domestic corporation created for the construction and operation of street railways, urban railways, or inter-urban railways;

(4) Any domestic or foreign corportation created for the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage;

(5) Any domestic or foreign corporation

created for the piping and marketing of natural gas for the purpose of supplying the public with natural gas or any partnership, which is or will be a natural gas company or an intrastate natural gas transporter as defined by federal or state law, composed entirely of such corporations or composed of the wholly owned subsidiaries of such corporations.

(6) Any domestic or foreign corporation created for the purpose of transmitting intelligence by telegraph or telephone;

(7) Any domestic or foreign corporation created for the purpose of generating, transmitting and distributing electricity and steam for power, lighting heating or other such uses. The generating plants, buildings, transmission lines, stations, and substations expropriated or for which property was expropriated shall be so located, constructed, operating, and maintained as not to be

dangerous to persons or property not interfere with the use of the wires of other using companies or, more than is necessary, with the convenience of the landowners."

(8) All persons included in the definition of common carrier pipelines as set forth in R.S. 45:251;

(9) Any domestic or foreign corporation created for piping and marketing of coal or lignite in whatever form or mixture convenient for transportation within a pipeline as otherwise provided for in R.S. 30:721 through 30:723;

(10) Any domestic or foreigh corporation or any partnership composed of such corporations or wholly owned subsidiaries thereof engaged in the piping or marketing of carbon dioxide for use in connection with a secondary or tertiary recovery project for the enhanced recovery of liquid or gaseous hydro-carbons approved by the commissioner of conservation.

Property may be so expropriated for the transportation of carbon dioxide for underground injection in connection with such projects."

STATEMENT OF THE CASE

This is an application for a Writ of Certiorari to review the Judgment of the State Court in a suit filed by Southern Natural Gas Company.

These are expropriation cases from Bienville Parish, Louisiana, in which Southern Natural Gas Company seeks to expropriate certain rights of the defendants. After many hearings and a protracted trial, the District Court determined that Southern Natural Gas Company had a right to expropriate and that the project was public and necessary. Petitioners asked for a jury trial on the question of damages. The jury returned a verdict of $3,500.00 per acre for the

storage rights taken, together with a judgment of approximately $2,500.00 for the mineral rights taken.

Southern Natural Gas Company, in these consolidated cases, seeks to expropriate a uniquely configured underground area for the storage of natural gas. It is the position of petitioner that said area is capable of producing and will produce oil and gas in paying quantities and that it is not feasible to use same for underground gas storage. Also, certain surface rights are being expropriated. Petitioners feel that a prudent operator would not have abandoned the Bear Creek Field in Bienville Parish for storage purposes.

This matter was appealed to the Honorable Second Circuit Court of Appeal, State of Louisiana, and on November 2, 1981, a judgment was rendered by the Honorable Second Circuit Court of Appeal, which the Honorable

Second Circuit Court of Appeal reduced the amount of damages that was found by the jury on the trial of the matter. An Application for Rehearing was filed by petitioners on December 10, 1981. Said Application for Rehearing was denied by the Honorable Second Circuit Court of Appeal. The petitioners then filed for writs to the Honorable Supreme Court of the State of Louisiana on Application for Writs of Certiorari and/or review. On February 19, 1982, the Honorable Supreme Court of the State of Louisiana denied writs.

REASONS FOR GRANTING THE WRIT

To answer the foregoing questing will make it obvious why a Writ should be granted herein:

I. THIS WRIT SHOULD BE GRANTED AS A MATTER OF LAW AND A MATTER OF EQUITY TO REVERSE THE FINDING OF THE LOUISIANA SUPREME COURT IN THAT THE LOUISIANA SUPREME

COURT ERRED IN NOT RULING THAT LSA-R.S. 30:22 AND LSA-R.S. 19:2 ARE UNCONSTITUTIONAL IN THAT THESE TWO STATUTES ARE IN VIOLATION OF AMENDMENT V OF THE UNITED STATES CONSTITUTION; IN VIOLATION OF AMENDMENT XIV, SECTION 1 OF THE UNITED STATES CONSTITUTION; THESE TWO STATUTES ARE IN VIOLATION OF THE UNITED STATES CONSTITUTION IN THAT THEY DEPRIVE A PERSON OF PROPERTY, WITHOUT DUE PROCESS OF LAW, IN THAT THEY ALLOW ONE PERSON, BEING A COMMISSIONER OF CONSERVATION, TO TAKE PRIVATE PROPERTY AND IN THE TAKING OF PRIVATE PROPERTY NOT ALLOW JUST COMPENSATION TO THE PROPERTY OWNERS.

LSA-R.S. 30:22 states as follows:

"...C. The commissioner shall determine with respect to any such underground resevoir proposed to be used as a storage reservoir, whether or not such resevoir is fully depleted of the

original commercially recoverable natural gas and condensate content therein. If the commissioner finds that such reservoir has not been fully depleted, the commissioner shall determine the amount of the remaining commercially recoverable natural gas and condensate content of such reservoir.

D. The commissioner may issure any necessary order providing that all natural gas which has previously been reduced to possession, and which is subsequently injected into an underground storage reservoir shall at all times be deemed the property of the injector, his sucessors and assigns; and in no event shall such gas be subjuct to the right of the owner of the surface of the lands or of any mineral interest therein under which such underground storage reservoir shall lie or be adjacent to or of any

person other than the injector, his successors and assigns, to produce, take, reduce to possession waste or otherwise interfere with or exercise any control thereover; provided that the injector, his successors and assigns, shall have no right to gas in any stratum or portion thereof not determined by the commissioner to constitute an approved underground storage reservoir. The commissioner shall issure such orders, rules and regulations as may be necessary for the purpose of protecting any such underground storage reservoir, strata or formations against pollution or against the escape of natural gas therefrom, including such necessary rules and regulations as may pertain to the drilling into or through such underground storage reservoir."

LSA-R.S. 19:2 states as follows:

"Where a price cannot be agreed upon

with the owner, any of the following may expropriate needed property:

(1) The state or its political corporations or subdivisions created for the purpose of exercising any state government powers;

(2) Any domestic or foreign corporation created for the construction of railroads, toll roads, or navigation canals;

(3) Any domestic corporation created for the construction and operation of street railways, urban railways, or interurban railways;

(4) Any domestic or foreigh corporation created for the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage;

(5) Any domestic or foreign corporation created for the piping and marketing of natural gas for the purpose of supplying the public with natural gas or any partnership, which is or will be a natural gas company or an intrastate natural gas transporter as defined by federal or state law, composed entirely of such corporations or composed of the wholly owned subsidiaries of such corporations.

(6) Any domestic or foreign corporation created for the purpose of transmitting intelligence by telegraph or telephone;

(7) Any domestic or foreign corporation created for the purpose of generating, transmitting and distributing electricity and steam for power, lighting, heating or other such uses. The generating plants, buildings, transmission lines, stations, and substations expropriated

or for which property was expropriated shall be so located; constructed, operated and maintained as not to be dangerous to persons or property nor interfere with the use of the wires using companies or, more than is necessary, with the convenience of the landowners;

(8) All persons included in the definition of common carrier pipelines as set forth in R.S. 45:251;

(9) Any domestic or foreign corporation created for piping and marketing of coal or lignite in whatever form or mixture convenient for transportation within a pipeline as otherwise provided for in R.S. 30:721 through 30:723;

(10) Any domestic or foreign corporation or any partnership composed of such corporations or wholly owned subsidiaries thereof engaged in the piping or marketing of carbon dioxide for use

in connection with a secondary or tertiary recovery project for the enhanced recovery of liquid of gaseous hydro-carbons approved by the commissioner of conservation. Property may be so expropriated for the transportation of carbon dioxide for underground injection in connection with such projects."

Both of these statutes are unconstitutional. The bodies of said statutes are broader than the title thereof. Under Article 1, Section 4 of the Louisiana Constitution of 1974, it must be determined in a judicial proceeding whether the purpose of the taking of private property is "public and necessary". LSA-R.S. 30:22 and LSA-R.S. 19:2 allows one to determine whether the taking of property is "public and necessary" without a judicial proceeding in violation of Article 1, Section 4 of the Louisiana Constitution of 1974. This is also a violation of the provisions of Amemdment V of the United States Constitution

and they are also in violation of Amendment XIV, Section 1 of the United States Constitution.

The 1974 Constitution of Louisiana, particularly the above cited portion, being Article 1, Section 4, was intended to give a far reaching effect and new protection of the rights of citizens to own and control provate property and this part of the 1974 Constitution of Louisiana actually goes beyond the provisions of the Federal Constitution in limiting the power of the government to regulate and control private property. See State vs. Green GMC Van, 354 So.2d 479.

LSA-R.S. 30:22 purports to establish that the underground storage of natural gas is in the public interest and for a public purpose, said determination being initially made by the Legislature contrary to the provisions of the Louisiana Constitution

and also the Federal Constitution which makes this a judicial function. LSA-R.S. 30:22 further illegally, unlawfully and unconstitutionally delegates to the Commissioner of Conservation the power to determine public interest and public purpose insofar as gas reservoirs are concerned, contrary to provisions of the Louisiana Constitution and provisions of the United States Constitution, and this in a sense is deprivation of private property without due process of law and also can lead to a deprivation of public property without just compensation.

In further support of the petitioners position State of Louisiana Acts 1906, number 208, said Acts being embodied into LSA-R.S. 19:2. LSA-R.S. 19:2 must be construed as a continuation of the 1906 Act and not as provided in the power of expropriation that the 1906 Act did not provide. A constitutional interpretation of LSA-R.S. 30:22 would make the findings of the Commissioner of

Conservation of the State of Louisiana only a threshold determination and would impose upon the judiciary the duty as provided under Article 1, Section 4 of the Louisiana Constitution of 1974 in which a determination as to "public and necessary" would be made independently by the judicial system and it is unconstitutional for a statute to allow one person, being the Commissioner of Conservation, to determine whether or not a person can be deprived of his private property without due process of law and just compensation.

Under the Louisiana Constitution and the United States Constitution the determination as to whether a project is "public and necessary" Should be a judicial question under the Constitution of Louisiana and the Constitution of the United States and should not be a question and left up to one person, being the Commissioner of Conservation of the State of Louisiana.

Article 1, Section 4 of the Louisiana Constitution of 1974 provides in part:

> "...Property shall not be taken or damaged by any private entity authorizedby law to expropriate, except for public and necessary purpose and with just compensation paid to the owners; in such proceedings, whether the purpose is public and necessary shall be a judicial question..."

Under the United States Constitution, Amendment XIV, Section 1 and Amendment 5, there is language provided in the United States Constitution to the same effect. The taking of property should be a judicial question as to whether or not it is "public and necessary". As reflected on the trial of the matter, the determination of whether this project was "public and necessary" was not done judicially, but was made by one

person, being the Commissioner of Conservation of the State of Louisiana. This is a violation of the Louisiana Constitution and the United States Constitution. LSA-R.S. 30:22 and 19:2 are unconstitutional, in that they do give the Commissioner of Conservation too much power to make an individual determination.

To show this Honorable United States Supreme Court how these property owners have been deprived of their property without just compensation, a clear reading of the opinion rendered by the Honorable Second Circuit Court of Appeal in which they reduced the damage awards that were given by the jury at the trial court are absolutely arbitrary and capricious and absolutely ridiculous.

In estimating the value of the property to be expropriated, the basis of assessment should be the value which the property possessed before the contemplated improve-

ment was proposed without deducting therefrom any amount for the benefit derived by the owner for the contemplated improvement or work.

LSA-R.S. 19:9 states in part:

> "The owner of property shall be compensated to the full extent of his loss."

The amounts awarded to these property owners by this Honorable Second Circuit Court of Appeal and also by the Louisiana Supreme Court, are very inadequate and are not awards of just compensation for damages suffered by thes property owners.

The Honorable Second Circuit Court of Appeal states at page 4 of the original decision herein as follows:

> "..Whether or not the reservoir is capable of producing oil and is capable of producing oil in paying quantities, whether or not three-fourths of the

owners in interest have agreed to the reservoir being used for the storage of natural gas, whether or not the reservoir is suitable and feasible for the storage of natural gas, and all other determinations set forth in LSA-R.S. 30:33 (B) which are required to be made by the Commissioner, are matters to be contested before the Commissioner or in an action before the Commissioner, and are not before the Court in expropriation action."

Obviously from the above statement, the above statement explains, in part, why the decision by the Honorable Second Circuit Court of Appeal is erroneous. How can any court make a determination as to whether or not the project before it is "public and necessary" without determining the above stated matters? Further, how can a court make an independent determination under the Constitution of Louisiana and under the

United States Constitution without determining the above stated factors as quoted from the decision of the Second Circuit Court of Appeal?

As Your Honors are aware, the right to own property is an essential constitutional right that each and every person has. By granting writs in this matter the Honorable United States Supreme Court can see how unconstitutional the statutes in question are, in that they do deprive persons of their property without due process of law and as in this case, without just compensation. The Honorable Second Circuit Court of Appeal, State of Louisiana, and also the Honorable Louisiana Supreme Court have violated these property owners constitutional rights, in that they have upheld the statutes, being LSA-R.S. 30:22 and LSA-R.S. 19:2, in that both of these statutes are unconstitutional on their face, in violation of the Louisiana Constitution of 1974 and also in

violation of the United States Constitution, Amendment V and Amendment XIV.

Therefore, Your Honors must grant Writs of Review in this matter to determine whether these particular statutes are unconstitutional in that they do deprive persons of their property without due process of law and without just compensation.

IN CONCLUSION

The petition for a Writ of Certiorari to this United States Supreme Court and to Your Honors should be granted to make a determination of whether said statutes in the State of Louisiana are unconstitutional in violation of the Louisiana Constitution and of the United States Constitution.

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BY: _____
BOBBY L. CULPEPPER

C E R T I F I C A T E

I hereby certify that a copy of the foregoing has been mailed, this date, postage prepaid, to all counsel of record, John M. Wilson, Liskow & Lewis, Attorneys at Law, 50th Floor, One Shell Square, New Orleans, Louisiana 70139, and also the Supreme Court of Louisiana and the Honorable Second Circuit Court of Appeals, State of Louisiana, on this the 10th day of May , 1982.

BOBBY L. CULPEPPER